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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 715

FREDERICO G. RANDACCIO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 720

CHARLES CACI, ALSO KNOWN AS BOBBY MILANO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 954

STEPHEN A. CINO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1112 Misc.

LOUIS SORGI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 401 F. 2d 664.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1968. Petitions for rehearing in Nos. 715, 720 and 1112 Misc. were denied on October 8, 1968. The petition for a writ of certiorari in No. 715 was filed on November 6, 1968. The petitions for certiorari in Nos. 720 and 1112 Misc. were filed on November 8, 1968, and are out of time under Rule 22–2 of the Rules of this Court. A petition for rehearing *en banc* in No. 954 was denied on December 18, 1968, and the petition for a writ of certiorari was filed on January 17, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conspiracy to obstruct commerce through robbery, charged in count one, constituted a crime within the reach of the Hobbs Act.

2. Whether there was valid evidence which sustained the convictions on both counts.

3. Whether the trial court erred in its charge in the following particulars:

> (a) In failing to give the alibi instruction requested by Randaccio (raised in Nos. 715, 720 and 954).

(b) In instructing that the government need not establish that petitioners knew or understood that their plan would delay or obstruct commerce (raised in No. 715).

(c) In instructing that the charge of a planned interstate transportation of stolen property would be sustained even though the property was first converted into cash (raised in No. 715).

4. Whether the method of compiling the jury list was improper (raised in Nos. 715, 720 and 954).

5. Whether the district court erred in determining for itself, after an *in camera* inspection, that records of an electronic surveillance were irrelevant to the prosecution (raised in Nos. 954 and 1112 Misc.).

STATUTE INVOLVED

18 U.S.C. 1951 provides in pertinent part as follows:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property,

or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

STATEMENT

After a jury trial in the United States District Court for the Western District of New York, petitioners were convicted of conspiracy to obstruct commerce through the robbery of Armored Transport, Inc. of Los Angeles, California, in violation of the Hobbs Act, 18 U.S.C. 1951. They were also convicted, under a separate count, of conspiracy to transport in interstate commerce goods of the value of $5,000 or more, knowing them to be stolen, in violation of 18 U.S.C. 2314. This second conspiracy embraced both a plan to rob Mrs. Carole McCune of jewelry and a plan to rob Armored Transport, Inc.[1] On December 11, 1967, Randaccio and Cino each were sentenced to concurrent terms of imprisonment for twenty and five years. Caci and Sorgi each were sentenced to concurrent terms of imprisonment for ten and five years (R. 2518–2521, 2819, 2822, 2823, 2820).[2] The court of appeals affirmed.

The government's evidence is recounted in considerable detail in the opinion of the court of appeals

[1] Co-defendant Natarelli was also convicted on both counts; his petition for a writ of certiorari is pending (No. 474, this Term).

[2] "R." refers to the record, "G.A." to the government appendix in the court of appeals (a copy of which we are lodging with the Clerk of this Court), and "G.E." to government exhibits.

(see Pet. in No. 715 App. A 34–37). On December 29, 1964, Pascal Calabrese (the key government witness at trial) robbed the City Hall in Buffalo, New York, and then went into hiding (R. 377, 385). On February 4, 1965, Cino invited Calabrese to meet with co-defendants Natarelli and Randaccio, whom Calabrese had known for several years (G.A. 2–3). Cino said they had lined up a couple of "scores", meaning "armed robberies". The meeting of the four men was held on the following evening at Natarelli's house at 60 Manchester Drive in Buffalo (G.A. 8–9, 46–48). Randaccio and Natarelli there explained to Calabrese a plan for two robberies at the Beverly Hilton Hotel in Los Angeles: first, the robbery of jewelry worth approximately $400,000 belonging to Mrs. McCune, who was planning to visit the hotel; and, second, the robbery of an "Armored Transport" messenger, who picked up the daily receipts at the hotel. Randaccio further told Calabrese that Caci would meet him in Los Angeles and introduce him to Sorgi, who was in charge of security at the Beverly Hilton Hotel; and that Cino would come to Los Angeles "a couple of days" later and would assist him in the robbery. He further told Calabrese that Cino would take the jewelry to San Francisco, to "fence" it, and then bring the proceeds back to Buffalo. He would later return to Los Angeles to give Calabrese his share (G.A. 9–11). Natarelli and Randaccio gave Calabrese money for his expenses and promised that Caci would give him more in Los Angeles (G.A. 11–12).

Two days later, on February 7, Calabrese flew to

Los Angeles. He met with Caci. They both registered at a Hollywood apartment house, Calabrese under the name "Peter O'Hara". Caci explained that the woman who had the jewelry was acquainted with both him and Sorgi, which was the reason they had arranged for Calabrese to rob her. Sorgi, he said, was in full charge of security at the Beverly Hilton and would conceal everything (G.A. 13–17).

Two days later, Caci and Calabrese met Cino at the airport. Cino had brought them more money for expenses (G.A. 18). That evening, the three discussed the robberies with Sorgi. The latter said that Mrs. McCune was expected to arrive by the weekend, and that she would have jewelry worth from four to five hundred thousand dollars with her. As for the robbery of the armored truck messenger, Sorgi thought that it would be "good for maybe $100,000". He said the security officers would not tell the police about the jewelry theft and that if there was no "heat" because of it they would be able to rob the truck during the same week (G.A. 19–23).

On February 11, Sorgi took Calabrese to the Hilton Hotel. They visited the suite on the eighth floor which Mrs. McCune, the owner of the jewelry, usually occupied when she was in town. Sorgi also showed Calabrese an item from the hotel's security file pertaining to a previous robbery of some $80,000 worth of Mrs. McCune's jewelry. Calabrese also was shown a messenger from Armored Transport making his daily pickup and then passing through a tunnel to his truck. Later Cino, Caci and Calabrese worked out

their plans for robbing the messenger. At that time Cino showed them a key which he said would open all the rooms in the hotel (G.A. 25–31). When Mrs. McCune failed to arrive as expected, Sorgi telephoned her and was told that she was delayed due to illness (G.A. 33).

On February 17, Calabrese received a report through Cino that he was being sought by the police in Buffalo and that Randaccio had said that he should remain where he was (G.A. 37–39). Calabrese, however, returned to Buffalo and surrendered to the local authorities (G.A. 40–41).

To corroborate Calabrese's testimony, the government (*inter alia*) adduced the testimony of Mrs. McCune concerning her telephone conversation with Sorgi regarding her failure to arrive at the hotel as scheduled. She further testified that she had reserved the hotel suite in January and usually brought approximately $500,000 worth of jewelry with her when she visited Los Angeles. There was further testimony from the manager of the Sunset Terrace Apartments in Hollywood. He stated that in February 1965 apartments were rented to B. Milano (petitioner Caci) and to a Mr. O'Hara. Among the items seized from Caci at the time of his arrest was a key ring containing a master key for the Beverly Hilton Hotel (G.A. 90–94). There were various other exhibits which confirmed aspects of Calabrese's testimony (see, *e.g.*, G. Ex. 1, G.A. 4, 6, 12, 45; G. Ex. 51, G.A. 69; G. Exs. 19–21, G.A. 44, 96).

ARGUMENT

1. Petitioners Caci and Cino argue that their convictions for a conspiracy to violate the Hobbs Act (count one) were invalid because that Act was meant to apply, not to all robberies that might affect commerce, but only to extortionate conduct or highway robberies.[3] The language of the statute, however, draws no such distinctions. As this Court pointed out in *Stirone* v. *United States,* 361 U.S. 212, 215, the Hobbs Act "speaks in broad language manifesting a purpose to use all the Constitutional power Congress has to punish interference with interstate commerce by extortion, *robbery* or physical violence" (emphasis added). See, also, *Battaglia* v. *United States,* 383 F. 2d 303, 305 (C.A. 9), certiorari denied, 390 U.S. 907; *United States* v. *Pranno,* 385 F. 2d 387 (C.A. 7), certiorari denied, 390 U.S. 944. Cf. *United States* v. *Nardello,* No. 51, this Term, which interpreted the companion Travel Act, 18 U.S.C. 1952, so as to effectuate Congress' intent to aid the States by combatting the interstate activities of organized crime. That the legislative history of the Hobbs Act neither requires nor warrants a narrowing of the express statutory terms, as urged by petitioners, is demonstrated in the opinion of the court below (401 F. 2d at 667–668). The statute, in short, is properly applicable to the conspiracy to rob charged in count one. See *United*

[3] See Caci Pet. 3–7; Cino Pet. 9–14.

States v. *DeSisto,* 329 F. 2d 929 (C.A. 2), certiorari denied, 377 U.S. 979.[4]

Equally specious is petitioner Randaccio's contention (R. Pet. 14–18) that a conspiracy to rob the checks from the Armed Transport service would not "affect" commerce. The company was an independent contractor, maintaining a messenger service for pickup and delivery of monies from a number of different business establishments. The pouch from the Beverly Hilton would be placed in the company's vault overnight and then delivered, on another route, to the bank, where out-of-state checks were mechanically segregated and thereafter routinely forwarded to correspondent banks or to the appropriate Federal Reserve Bank. Approximately 59 percent of the checks received by the hotel during the period of the conspiracy were drawn on out-of-state banks (G.A. 9), and about 80 percent of the American Express travelers' checks negotiated at the hotel during this period went to the American Express office in New York City (G.A. 74–75). This is enough to bring the statutory proscription into play. See *Stirone* v. *United States, supra,* 361 U.S. at 215; *United States* v. *Kramer,* 355 F. 2d 891, 896–898 (C.A. 7), partially vacated and remanded on other grounds, *Kramer* v. *United States,* 384 U.S. 100. Indeed, the very cases relied upon by this petitioner hold that where an object has left the owner's possession and has come into the possession

[4] The attempt by petitioner Caci to distinguish *DeSisto* as a "highway robbery" overlooks the fact that the definition of robbery contained in the statute makes no such distinction (see 18 U.S.C. 1951(b)(1), *supra,* pp. 3–4).

of someone who, without more than inevitable pauses, is to pass it along on an interstate journey, it has entered interstate commerce. *United States* v. *Fox*, 126 F. 2d 237, 238 (C.A. 2); *United States* v. *Sherman*, 171 F. 2d 619 (C.A. 2), certiorari denied, *sub nom. Grimaldi* v. *United States*, 337 U.S. 931.

2. The various evidentiary claims are not well taken.

a. Petitioner Cino contends that the evidence was insufficient to sustain his conviction on the ground that the testimony of Calabrese lacked corroboration directly implicating him (Cino Pet. 15–20). The federal courts, however, do not require corroboration of the testimony of an accomplice to support a conviction. *E.g., Caminetti* v. *United States*, 242 U.S. 470, 495; *United States* v. *Marks*, 368 F. 2d 566 (C.A. 2), certiorari denied, 386 U.S. 933; *United States* v. *Maddox*, 394 F. 2d 297 (C.A. 4).

Nor is there sufficient reason submitted to warrant reexamination of that rule in this case. The court here instructed that the testimony of an accomplice should be received with caution and weighed with great care; that the jury should not convict a defendant on the unsupported testimony of an accomplice unless it believed such testimony beyond all reasonable doubt; and that since Calabrese had been a perjurer in the past, the jury should, for that reason also, consider his testimony with caution and weigh it with great care (G.A. 158–159). Moreover, although the extensive evidence corroborative of Calabrese's testimony did not specifically implicate Cino, it supported Calabrese's account of the circumstances from the initial invitation extended by Cino to Calabrese in Buffalo

through the various meetings of the conspirators after Cino brought them more money in Los Angeles (*supra*, pp. 5–7). Since this corroborative evidence directly supported portions of Calabrese's testimony, it gave weight to the overall credibility of his testimony—including his incriminatory testimony as to Cino. See 7 Wigmore, *Evidence* (3d. ed.) § 2059, p. 327.

b. Similarly without merit is Caci's contention that the evidence was insufficient to sustain his conviction on Count 2 (conspiracy to transport stolen goods in interstate commerce) because it was not shown that he knew that part of the plan was to send the proceeds of the jewelry theft to Buffalo (Caci Pet. 7–10). As the court of appeals pointed out (401 F. 2d at 669), "Caci was intimately involved in the preparations for the theft and this fact alone provides sufficient basis for inferring that he knew how the proceeds would be disposed of. Caci knew that Randaccio and Natarelli were directing the operation from Buffalo; he must have known that they would receive their share in Buffalo". Cf. *Pereira* v. *United States,* 347 U.S. 1.

c. Cino urges that "post-conspiracy hearsay" was erroneously admitted in evidence, referring to pages in the record involving two conversations (Cino Pet. 21–22). This contention was not made in the court below, and there are no exceptional circumstances which might nevertheless justify review. *Lawn* v. *United States,* 355 U.S. 339, 362 n. 16. At all events, the claim is without substance. After Calabrese returned to Buffalo and surrendered to the police on a charge uncon-

nected with the present case, he met Cino in a restaurant and asked him, "How is that score on the coast?" Cino replied, "Still there, don't worry about it, you have enough trouble right now." On the following weekend, Calabrese met Randaccio and asked, "How about this woman out there with the jewelry and the armored truck?" Randaccio's reply was, "Don't worry about it, you have enough heat on you. We'll have a score for you later. Take care of yourself right now" (G.A. 42). The conversations took place within the period of the conspiracy as alleged in the indictment and, contrary to petitioner's claim that the conspiracy was at an end when they were made, these statements showed its continued vitality. Furthermore, the first conversation, with Cino himself, clearly was not hearsay and was admissible against him. The conversation with Randaccio was merely repetitive.

3. None of the alleged errors in the trial court's instructions warrant plenary review by this Court.

a. It is urged that an alibi instruction submitted by Randaccio should have been given (Randaccio Pet. 9–14; Caci Pet. 10; Cino Pet. 21). However, Randaccio failed to make a proper request in that regard. Four days before submission of the case to the jury, the court conferred with counsel relative to instructions, at which time Randaccio's counsel presented twenty-five requests, none including an alibi instruction. After some discussion about other matters, Randaccio's counsel said that he expected to give the court supplemental requests later in the day. The court said

it would like to have these as soon as possible (G.A. 126–133).

Subsequently, on the day before the case was submitted, the court read the following stipulation to the jury (G. A. 135):

> The Government and the defendant Frederico Randaccio stipulate that on February 5, 1965, a witness, who is not being called to testify, was in a position to overhear, but not see, certain activities in an apartment in the City of Buffalo. That apartment, occupied by a person who is not a defendant in this case, is located approximately nine-tenths of a mile from 60 Manchester Place. At 7:50 P.M. on that evening Frederico Randaccio was heard arriving at the apartment and talking to the occupant of that apartment. The TV, which had been turned on, was then turned up louder. Continuous loud TV ensued for the balance of the evening during which no other sound, movement or conversation was heard indicating whether Frederico Randaccio remained or left the premises.

Following this, the court reminded Randaccio's counsel of his previous representations that he would submit additional requests to charge (G.A. 132, 136). None was then tendered. Fifteen minutes before the appointed time for charging the jury, Randaccio's counsel, for the first time, submitted four additional written requests, one of which was the alibi instruction.[5] The court had a hasty look at the proposed

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[5] This reads as follows (R. 2805–2806): "The defendant, FREDERICO G. RANDACCIO, has raised the defense of alibi in that he had introduced proof by way of a stipulation between himself and the Government that at 7:50 p.m. on the

instructions but declined to use their language in its charge, which, in the court's view, sufficiently embodied the same principles (G.A. 165–166).

In the charge, the court instructed fully as to the presumption of innocence and the burden upon the government at all times to prove every element of a defendant's guilt beyond a reasonable doubt (G.A. 155–158). Randaccio's counsel discussed his exceptions extensively, but made no mention of the alibi instruction (G.A. 167–168). The court said in response that the lateness of the requests was not the cardinal problem, but that it believed that the principles embodied in the requested instructions had been sufficiently covered in the charge (G.A. 168). Counsel did not challenge the court's conclusion regarding an alibi instruction.

In these circumstances, petitioner should not be heard to claim prejudicial error in the court's failure to give an alibi instruction. Rule 30, F.R. Crim. P., provides that parties may file their written requests for instructions "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs" and may not "assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its

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evening of February 5th, 1965, he was at another residence in the City of Buffalo, nine-tenths of a mile away from the place where the alleged meeting of the other alleged co-conspirators was to have taken place.

"I charge you that if this proof, when taken into consideration with all the other evidence, raises a reasonable doubt in your mind as to the defendant Randaccio's guilt, then he is entitled to an acquittal."

verdict * * *". No reasonable excuse for the plain noncompliance with these requirements appears on this record. The defense introduced medical testimony pertinent to the alibi defense during the trial. Counsel's ability was apparent from the numerous instructions offered and the care with which exceptions were noted. Moreover, as the court of appeals pointed out, the alibi defense was "far from compelling" (401 F. 2d at 670). Here the evidence contained in the stipulation showed only that Randaccio was present at the apartment of his friend at 7:50 p.m.; it was in no way inconsistent with Calabrese's story that Randaccio was at Natarelli's house, nine-tenths of a mile away, about 25 minutes (8:15 p.m.) later (G.A. 8–9, 46–48). See *Schuermann* v. *United States,* 174 F. 2d 397, 401 (C.A. 8); *Guthrie* v. *United States,* 207 F. 2d 19, 24 (C.A.D.C.); see, also, *Goldsby* v. *United States,* 160 U.S. 70, 77.

The further assertion that the claimed error was aggravated by the court's failure to charge at any time that the evidence as to each defendant should be separately considered (Randaccio Pet. 13) is refuted by the record. The court instructed, "You will, of course, separately weigh and determine the evidence as to each defendant and each count in the indictment; that is, you will determine the guilt or innocence of each defendant as to each count of the indictment separately" (G.A. 156).[6]

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[6] The claim that the jury may have been misled as to where the burden of proof lay (*cf. Johnson* v. *Bennett,* No. 32, this Term, decided December 16, 1968) has no basis in fact. They were told that the "burden of proof that a person is guilty beyond a reasonable doubt rests with the Government at all times; it never shifts to a defendant" (G.A. 155).

b. The contention is also made (Randaccio Pet. 18) that it was error to instruct on count one that it was not necessary that the defendants knew that the carrying out of the conspiracy would have affected commerce (G.A. 154). This was a correct statement of the law. *Nick* v. *United States,* 122 F. 2d 660, 673 (C.A. 8), certiorari denied, 314 U.S. 687; *United States* v. *Varlack,* 225 F. 2d 665, 672 (C.A. 2); *United States* v. *Pranno,* 385 F. 2d 387, 389–390 (C.A. 7), certiorari denied, 390 U.S. 944. *Cf. United States* v. *Patten,* 226 U.S. 525, 543. See our brief in opposition in the *Natarelli* case (Br. in Opp. in No. 474, this Term, p. 5).

c. The instruction that a change in the form of the stolen property into cash would not warrant acquittal (G.A. 142), challenged by Randaccio (R. Pet. 22–23), was proper. *United States* v. *Walker,* 176 F. 2d 564, 566 (C.A. 2), certiorari denied, 338 U.S. 891. Randaccio's related contention that there was no proof that the money received from selling the jewelry would exceed $5,000 (Randaccio Pet. 22) is insubstantial. Value under the statute is market value at the time and place of the taking, 18 U.S.C. 2311; *Cave* v. *United States,* 390 F. 2d 58, 67 (C.A. 8); *Herman* v. *United States,* 289 F. 2d 362 (C.A. 5), certiorari denied, 368 U.S. 897; *Husten* v. *United States,* 95 F. 2d 168 (C.A. 8). The value of the jewelry was shown to be approximately a half million dollars.

4. Petitioners contend that there was a significant departure from federally mandated standards in the system here used to compile the jury list (see Randaccio Pet. 23–31). That system involved the drawing

of names from a jury box, which were derived equally from two different primary sources. The first of these sources consisted of names of persons qualified as State jurors and chosen by New York authorities from voter registration lists as well as other sources. It is claimed that non-voters were thus under-represented, as were women because the New York law permits women to claim exemption if they do not wish to serve as jurors. Voter registration lists, however, are an approved source. *Chance* v. *United States,* 322 F. 2d 201, 203 (C.A. 5), certiorari denied, 379 U.S. 823; *United States* v. *Kelly,* 349 F. 2d 720, 778 (C.A. 2), certiorari denied, 384 U.S. 947; *United States* v. *Agueci,* 310 F. 2d 817, 833–834 (C.A. 2), certiorari denied, 372 U.S. 959. Indeed they are a principal source under the recently enacted Jury Selection and Service Act, P.L. 90–274, 82 Stat. 53. And the propriety of permitting women to claim exemption from jury service is recognized. *Fay* v. *New York,* 332 U.S. 261, 277–278; *Hoyt* v. *Florida,* 368 U.S. 57.[7]

The second primary source consisted of names furnished to the federal Jury Commissioner, principally derived from "keymen". The Commissioner stated that he tried to balance the racial groups and that he told his keymen he wanted jurors who could understand the judge's charge (G.A. 106–109). It is objected that this procedure empowered the Commissioner to impose standards not fixed by statute (Randaccio Pet. 28–29). The statute in force at the time this case was tried, however, disqualified as a juror a

[7] In fact, three women served on the jury in this case (401 F. 2d at 671).

person who was "incapable, by reason of mental or physical infirmities to render efficient jury service". 28 U.S.C. 1861(3). This would seem sufficient to authorize the limited discretion here exercised by the Commissioner. Cf. *United States* v. *Flynn,* 216 F. 2d 354, 387 (C.A. 2), certiorari denied, 348 U.S. 909; *United States* v. *Henderson,* 298 F. 2d 522, 525 (C.A. 7), certiorari denied, 369 U.S. 878. Nor was this a blanket departure from statutory requirements resulting in a racial imbalance. See *United States* v. *Rabinowitz,* 366 F. 2d 34, 51 (C.A. 5). In any event, in view of the enactment of the Jury Selection and Service Act, *supra,* such discrepancies as may have existed in interpretation of the old statute raise no issues of recurring concern or general importance.

5. The claim that the convictions were tainted by electronic overhearings of conversations of defendants is dealt with in our brief in opposition in the *Natarelli* case (see Br. in Opp. in No. 474, this Term, pp. 6–8). Our response in that brief fully answers the claim of illegal overhearing alleged here.

There is no merit to the additional claim of petitioners Sorgi and Cino that the government violated their rights by listening on an extension telephone to Sorgi's telephone conversation with one Michael Fitzgerald. The government acted with Fitzgerald's consent. See *Rathbun* v. *United States,* 355 U.S. 107. Moreover, this conversation—a transcription of which was turned over to the defense counsel prior to trial—

was never introduced at trial, nor was any evidence that was introduced the fruit of the monitored conversation.[8]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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FEBRUARY 1969.

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[8] Petitioner Sorgi raises, without arguing, a question as to whether there was a fatal variance with respect to count one, which charged that the defendants confederated and agreed to "obstruct, delay and affect commerce and the movement of money in commerce", whereas the proof was only that there may have been interference with the movement of checks (Sorgi Pet. 3). There was no objection on the ground of variance at trial. Moreover, as we point out in our brief in opposition in *Natarelli* v. *United States*, No. 474, this Term, pp. 4–5, interference with the interstate movement of checks would necessarily affect the movement of money.

Petitioner Cino also raises (Cino Pet. 20), but does not argue, the issue that the trial court erred in refusing to call back the discharged jury seven days after the verdict on the possibility that they might have heard a radio broadcast concerning the case just before the case was submitted to them. The court repeatedly instructed the jury not to listen to radio broadcasts regarding the case. There was not the slightest showing that these instructions were not followed.

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REPLY BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 954

STEPHEN A. CINO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF FOR UNITED STATES IN OPPOSITION

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1. Concerning petitioner Cino's contention of improper use of post-conspiracy hearsay (Pet. Cert. No. 954, Question Presented 9 (at p. 5), argued at pp. 21-22, with which see p. 23), the Brief in Opposition states (p. 11) that "This contention was not made in the Court below". We take it that the Government means the contention was not made in the Court of Appeals. But the point was expressly preserved at the trial (R. 262-263, 265-266; and see the related item at R. 257-258).

2. The Government has not replied to our contention that the Hobbs Act (18 U.S.C. §1951) is *unconstitutional* (Pet. Cert. No. 954, Questions Presented 1, 2, 3 at p. 3), argued at pp. 9-14). The Government treats our Hobbs Act argument solely as an argument addressed to *interpretation* of the statute (Br. in Opp. 8-9).

3. The Government has not replied to our contention of inadequacy of the proofs of the interstate commerce character of certain checks (Pet. Cert. No. 954, Question Presented 10 (at p. 5), argued at pp. 22-23).

CONCLUSION

It is respectfully submitted that this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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